2-29-2012

State v. Warth Appellant's Brief Dckt. 38854

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 38854 & 38984
	)	
v.	)	
	)	
SHAYNE RICHARD WARTH,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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STATEMENT OF THE CASE

Nature of the Case

In docket number 38854, Mr. Warth timely appeals from the district court's order relinquishing jurisdiction, requiring him to serve the previously imposed sentence of four years, with eighteen months fixed, which he received for his guilty plea to possession of methamphetamine with intent to deliver. In docket number 38984, Mr. Warth a timely appeals from the district court's order relinquishing jurisdiction, requiring him to serve the previously imposed sentences of five years, with two years fixed, and of six years, with thirty months fixed, which he received for his guilty pleas to two counts of delivery of a controlled substance.

On appeal, Mr. Warth argues that the Idaho Supreme Court denied him due process of law when it refused to augment the record with a transcript of a combined probation violation admission and disposition hearing. Additionally, Mr. Warth argues that the district court abused its discretion when it relinquished jurisdiction and executed excessively harsh sentences.

Statement of the Facts and Course of Proceedings

In docket number 38854, Mr. Warth was charged, by information, with trafficking in methamphetamine. (R. Vol. I, pp.33-34.) In docket number 38984, Mr. Warth was charged, by information, with two counts of delivery of a controlled substance. (R. Vol. II., pp.178-179.)[1] Pursuant to a global plea agreement, the State amended the charge in docket number 38854 to possession of methamphetamine with intent to deliver to which Mr. Warth pleaded guilty. (R. Vol. I, pp.52-60.) As part of that agreement,

Mr. Warth also pleaded guilty to both counts of delivery of a controlled substance. (R. Vol. II., pp.197-200.) In docket number 38854, the district court imposed a unified sentence of four years, with eighteen months fixed, but suspended the sentence and placed Mr. Warth on probation. (R. Vol. I., pp.70-75.) In docket number 38984, the district court imposed a unified sentence of five years, with two years fixed, for Count I, and a unified sentence of six years, with thirty months fixed, for Count II, but suspended the sentence and placed Mr. Warth on probation. (R. Vol. II., pp.218-222; 05/14/07 Tr., p.47, Ls.9-24.) Additionally, the district court ordered the sentences in docket number 38854 and 38984 to run concurrently. (R. Vol. I., p.71; R., Vol. II., p.219.)

After a period of probation, the State filed a report of probation violation in docket number 38854, wherein it alleged that Mr. Warth violated various terms of his probation. (R. Vol. I., pp.86-87.) Pursuant to a plea agreement, the State withdrew its report of probation violation. (R., p.89.)

After a further period of probation, the State filed a report of probation violation in both cases, wherein it alleged that Mr. Warth violated various terms of his probation. (R. Vol. I., pp.90-91; R. Vol. II., pp.237-238.) Mr. Warth then admitted to violating the terms of his probation.[2] (R. Vol. I., pp.102-104; R. Vol. II., pp.246-248.) Thereafter, the

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[1]These two cases were never consolidated by the district court. However, they were treated as such.

[2] While the record reflects that Mr. Warth admitted to his probation officer that he left his assigned district without permission and used alcohol, marijuana, and methamphetamine, the record on appeal does not reflect the specific admission Mr. Warth made to the district court. (R. Vol. I., pp.90-97, 102-104; R. Vol. II., pp.237-241) Appellate counsel anticipated this type of issue and filed a motion to augment the record on appeal requesting that a transcript of the June 29, 2009, probation violation admission and disposition hearing be created for the record on appeal. (Motion To Augment And Suspend The Briefing Schedule And Statement In Support Thereof (*hereinafter,* Motion to Augment), pp.1-5. That motion was denied by the Idaho Supreme Court. (Order Denying Motion To Augment And Suspend The Briefing Schedule (*hereinafter* "Order Denying Motion to Augment"), p.1.)

district court entered its Order Continuing Probation, wherein the district court ordered Mr. Warth to complete the Wood Pilot Project. (R. Vol. I., p.105; R., Vol. II., p.249.)

After another period of probation, the State filed a report of probation violation, wherein it alleged that Mr. Warth violated various terms of his probation. (R. Vol. I., pp.110-112; R. Vol. II., pp.253-255.) Mr. Warth admitted to being terminated from the Wood Pilot Project and using Synthetic Cannabinoid Spice. (10/12/10 Tr., p.3, L.3 – p.6, L.16.) Thereafter, the district court revoked Mr. Warth's probation and executed the underlying sentence, but retained jurisdiction. (R., Vol. I., pp.119-122; R. Vol. II., pp.261-265.)

Following Mr. Warth's "rider," the district court relinquished jurisdiction without a hearing.[3] (R., Vol. I., p.123; R. Vol.II., p.266.) Mr. Warth timely appealed. (R. Vol. I., pp.124-127; R. Vol. II., pp.268-271.)

On appeal, Mr. Warth's appellate counsel filed a motion to augment and suspend the briefing schedule, wherein appellate counsel requested that the record on appeal be augmented with various transcripts. (Motion to Augment), pp.1-5.) The State objected to Mr. Warth's request for the transcripts. (Objection to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof," (*hereinafter,* Objection to Motion to Augment), pp.1-5.) Thereafter, the Idaho Supreme Court entered its Order Denying Motion to Augment, denying Mr. Warth's request for the transcripts. (Order Denying Motion to Augment), p.1)

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[3] According to the district court's Order Relinquishing Jurisdiction, Mr. Warth's rider in this matter was treated as if it was ordered to run concurrently with a rider which was ordered in an unrelated case, which was filed in a different county. (R. Vol. I., p.123; R. Vol. II., p.266.) Since the district court presiding over the unrelated case relinquished jurisdiction, the district court in this matter relinquished jurisdiction because it thought that "probation is not an option . . . ." (R. Vol. I., p.123; R. Vol. II., p.266.)

ISSUES

1. Did the Idaho Supreme Court deny Mr. Warth due process and equal protection when it denied his Motion to Augment with the requested transcript?

2. Did the district court abuse its discretion when it relinquished jurisdiction?

3. Did the district court abuse its discretion when it failed to reduce Mr. Warth's sentences *sua sponte* upon relinquishing jurisdiction?

ARGUMENT

I.

The Idaho Supreme Court Denied Mr. Warth Due Process And Equal Protection When It Denied His Motion To Augment The Record With The Requested Transcript

A. Introduction

A long line of United States Supreme Court cases hold that it is a violation of the Fourteenth Amendment's due process and equal protection clauses to deny an indigent defendant access to transcripts of proceedings which are relevant to issues the defendant intends to raise on appeal. The only way a court can constitutionally preclude an indigent defendant access to a requested transcript is if the State can prove that the transcript is irrelevant to the appeal.

In this case, Mr. Warth filed a Motion to Augment, requesting, *inter alia*, a transcript of the probation violation admission and disposition hearing, held June 29, 2009, wherein he argued that, when determining whether to relinquish jurisdiction, a district court can consider all of the hearings before and after sentencing. On appeal, Mr. Warth is challenging the Idaho Supreme Court's denial of his request for the transcript of the probation violation admission and dispositional hearing, held June 29, 2009. Mr. Warth asserts that the requested transcript is relevant to the district court's decision to relinquish jurisdiction and its sentencing determination because it occurred after sentencing, and the district court could have, therefore, relied on its memory of that hearing when it decided to relinquish jurisdiction and execute the underlying sentences. Therefore, the Idaho Supreme Court erred in denying his request.

B. The Idaho Supreme Court Denied Mr. Warth Due Process And Equal Protection When It Denied His Motion To Augment The Record With The Requested Transcript

1. The Idaho Supreme Court, By Failing To Provide Mr. Warth With Access To The Requested Transcript, Has Denied Him Due Process Because He Cannot Obtain A Merit Based Appellate Review Of His Claims

The constitutions of both the United States and the State of Idaho guarantee a criminal defendant due process of law. *See* U.S. CONST. amend. XIV; ID. CONST. art. I §13.

> It is firmly established that due process requires notice and a meaningful opportunity to be heard. *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948). The Due Process Clause of the Fourteenth Amendment also protects against arbitrary and capricious acts of the government. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Due process requires that judicial proceedings be "fundamentally fair." *Lassiter v. Department of Soc. Serv. of Durham Cty.*, 452 U.S. 18, 24 (1981).

State v. Card, 121 Idaho 425, 445 (1991) (*overruled on other grounds by State v. Wood*, 132 Idaho 88 (1998)). Additionally, the Idaho Supreme Court has "applied the United States Supreme Court's standard for interpreting the due process clause of the United States Constitution to art. I, Section 13 of the Idaho Constitution." *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 227 (1998).

In Idaho, a criminal defendant's right to appeal is created by statute. *See* I.C. § 19-2801. Idaho statutes dictate that if an indigent defendant requests a transcript, the cost of such transcript must be created at county expense. I.C. § 1-1105(2); I.C. § 19-863(a). Idaho court rules also address this issue. Idaho Criminal Rule 5.2 mandates the production of transcripts when requested by an indigent defendant. I.C.R. 5.2(a). Further, "[t]ranscripts may be requested of any hearing or proceeding before the court . . . ." *Id.* Idaho Criminal Rule 54.7 further enables a district court to

"order a transcript to be prepared at county expense if the appellant is exempt from paying such a fee as provided by statute or law." I.C.R. 54.7(a).

An appeal from an order relinquishing jurisdiction is an appeal of right as defined in Idaho Appellate Rule 11. "Relief from . . . [an order relinquishing jurisdiction] may appropriately be sought through a direct appeal." *State v. Urias* 123 Idaho 751, 754 n.1 (Ct. App. 1993).

The United States Supreme Court has issued a long line of cases that directly address whether indigent defendants, who have a statutory right to an appeal, can require the state to pay for an appellate record including verbatim transcripts of the relevant proceedings. There are two fundamental themes which permeate these cases. The first theme is that the Fourteenth Amendment's due process and equal protection clauses are interpreted broadly. Any disparate treatment between indigent defendants and those with financial means is not tolerated. However, the second theme limits the states' obligation to provide indigent defendants with a record for review. The states do not have to provide indigent defendants with everything they request. In order to meet the constitutional mandates of due process and equal protection, the states must provide indigent defendants with an appellate record unless some or all of the requested materials are unnecessary or frivolous.

The seminal opinion in this line of cases is *Griffin v. Illinois*, 351 U.S. 12 (1956). In that case, two indigent defendants "filed a motion in the trial court asking that a certified copy of the entire record, including a stenographic transcript of the proceedings, be furnished them without cost." *Griffin*, 351 at 13. At that time, the State of Illinois provided free transcripts for indigent defendants that had been sentenced to death, but required defendants in all other criminal cases to purchase transcripts

themselves. *Id.* at 14. The sole question before the United States Supreme Court was whether the denial of the requested transcripts to indigent non-death penalty defendants was a denial of due process or equal protection. *Id.* at 16.

The Supreme Court initially noted that "[p]roviding equal justice for poor and rich, weak and powerful alike is an age old problem." *Id.* "Both equal protection and due process emphasize the central aim of our entire judicial system-all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Id.* The Supreme Court went on to hold as follows:

> There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. at 18 (citations and footnotes omitted). In order to satisfy the constitutional mandates of both due process and equal protection, an indigent defendant must be provided with a record which facilitates an effective merits-related appellate review. At the same time, the Supreme Court noted that a stenographic transcript is not necessary in instances where a less expensive, yet adequate, alternative exists. *Id.* at 20.

In *Burns v. Ohio*, 360 U.S. 252 (1959), the Supreme Court reaffirmed its holding in *Griffin* when it struck down a requirement that all appeals to the Ohio Supreme Court be accompanied with a requisite filing fee, regardless of a defendant's indigency. In that case, the State argued that the defendant had already received appellate review of his conviction by the Ohio appellate court. *Burns*, 360 U.S. at 257. The United States Supreme Court rejected this argument and ruled that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.* "This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." *Id.*

In *State v. Draper*, 372 U.S. 487 (1963), the Supreme Court addressed a procedure determining access to transcripts based on a frivolousness standard. "Under the present standard, . . . , they must convince the trial judge that their contentions of error have merit before they can obtain the free transcript necessary to prosecute their appeal." *Draper*, 372 U.S. 494. The Supreme Court first expanded upon its statement in *Griffin*, that a stenographic transcript is not required if an equivalent alternative is available, by adding a relevancy requirement when stating that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances." *Id.* at 495. The Court went on to discuss the specific issues raised for appeal by the defendants to decide the relevance of the requested transcripts. The Court ultimately concluded that the issues raised by the defendants could not be

adequately reviewed without resorting to the stenographic transcripts of the trial proceedings. *Id.* at 497-99.

Mayer v. City of Chicago, 404 U.S. 189 (1971), extended the *Griffin* protections to defendants convicted of non-felony offenses, and placed the burden on the State to prove that the requests for verbatim transcripts are not relevant to the issues raised on appeal. In doing so, it was held that a defendant need only make a colorable argument that he/she needs items to create a complete record on appeal. *Id.* at 195. If the State wants to deny the defendant's request, it is the State's burden to prove that the requested items are not necessary for the appeal. *Id.*

This authority has been recognized by both the Idaho Supreme Court and the Idaho Court of Appeals. *See Gardener v. State*, 91 Idaho 909 (1967); *State v. Callaghan*, 143 Idaho 856 (Ct. App. 2006); *State v. Braaten*, 144 Idaho 60 (Ct. App. 2007).

An application of the foregoing rules to the facts of this case creates a situation analogous to *Lane v. Brown*, 372 U.S. 477 (1863). In that case, a transcript was necessary to perfect an appeal and the appeal could be dismissed without the transcript. *Lane*, 327 U.S. at 478-81. Similarly in Idaho, an appellant must provide an adequate record or the appeal can be dismissed. "It is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, . . . and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34 (Ct. App. 1999). If the transcripts are missing, but the record contains court minutes, that may be sufficient so that a "meaningful review of [an appellant's] claim is possible, although the Idaho Court of Appeals has

"strongly suggest[ed] that appellate counsel not rely on the district court minutes to provide an adequate record for [that] Court's review." *State v. Murphy*, 133 Idaho 489, 491 (Ct. App. 1999). During one of Mr. Warth's periods of probation, he admitted to his probation officer that he left his assigned district without permission and used alcohol, marijuana, and methamphetamine. (R. Vol. I., pp.90-97, R. Vol. II., pp.237-241.) The court minutes of the probation violation admission and dispositional hearing do not reflect the specific admissions Mr. Warth made to the district court. (R. Vol. I., pp.102-104; R. Vol. II., pp.246-248.) If Mr. Warth fails to provide the appellate court with the requested item, the legal presumption will apply and Mr. Warth's claims will not be addressed on their actual merits. If it is state action alone, which prevents him from access to the requested items, then such action is a violation of due process, as per *Lane*, and any such presumption should no longer apply.

Additionally, the requested item is within an Idaho appellate court's scope of review. The transcript of the combined probation violation admission and dispositional hearing is relevant because Idaho appellate courts review all proceedings following sentencing when determining whether the court appropriately relinquished jurisdiction. *State v. Schultz*, 149 Idaho 285, 289 (Ct. App. 2010); *see also State v. Hanington,* 148 Idaho 26, (Ct. App. 2009) ("When we review a sentence that is ordered into execution following a period of probation, we will examine the *entire record* encompassing events before and after the original judgment. We base our review upon the facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation.") (emphasis added).

In sum, there is a long line of cases which repeatedly hold it is a violation of both due process and equal protection to deny indigent defendants transcripts of

proceedings on appeal. The decision to deny Mr. Warth's Motion to Augment will render his appeal meaningless because it will be presumed that the missing transcript supports the district court's order relinquishing jurisdiction. This functions as a procedural bar to the review of Mr. Warth's appellate sentencing claims on the merits, and therefore, Mr. Warth should either be provided with the requested transcript or the presumption should not be applied.

2. The Idaho Supreme Court, By Failing To Provide Mr. Warth With Access To The Requested Transcript, Has Denied Him Due Process Because He Cannot Obtain Effective Assistance Of Counsel On Appeal

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Sixth Amendment right to counsel in the context of death penalty cases was selectively incorporated to the states through the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In coming to this conclusion, the United State Supreme Court reasoned that the ability to be heard by counsel is so inextricable related to due process that the denial of counsel is tantamount to the denial of a hearing. *Powell*, 287 U.S. at 64. The Supreme Court also stated that under the facts of *Powell* "the necessity of counsel was so vital and imperative that the failure to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment . . . [to] hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" *Id.* at 65. (*quoting Holden v. Hardy*, 169 U.S. 366 (1898).

In *Douglas v. California*, 372 U.S. 353 (1963), the United States Supreme Court relied on *Griffin*, *supra*, and is progeny and determined that the Equal Protection Clause of the Fourteenth Amendment requires the states to provide indigent defendants the

right to counsel on appeal. In *Evitts v. Lucey*, 469 U.S. 387 (1985), the protection of *Douglas* was extended to the right to effective assistance of counsel on appeal. According to the United State Supreme Court:

> In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal-like the promise of *Gideon* that a criminal defendant has a right to counsel at trial would be a futile gesture unless it comprehended the right to effective assistance of counsel.

Evitts, 469 U.S. at 397.

The remaining issue is defining effective assistance of counsel. According to the United States Supreme Court, appellate counsel must make a conscientious examination of the case and file a brief in support of the best arguments to be made. *Anders v. California,* 386 U.S. 738, 744 (1967), held that the constitutional requirements of substantial equality and fair process "can only be attained where counsel acts as an active advocate on behalf of his client . . . . [Counsel's] role as advocate requires that he support his client's interest's to the best of his ability." *See also Banuelos v. State,* 127 Idaho 860, 865 (Ct. App. 1995). In this case, the lack of access to the requested transcript has prevented appellate counsel from making a conscientious examination of the case and has potentially prevented appellate counsel from determining whether there is an additional issue to raise, or whether there is a factual support either in favor of any argument made or undercutting any argument made. Therefore, Mr. Warth has not obtained review of the court proceedings based on the merits and was not provided with effective assistance of counsel in that endeavor.

Furthermore, in *State v. Charboneau,* 116 Idaho 129, 137 (1989) (*overruled on other grounds by State v. Card,* 121 Idaho 425 (1991)), the starting point of evaluating whether counsel renders effective assistance of counsel in a criminal action is the AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMNAL JUSTICE, THE DEFENSE FUNCTION.

These standards still offer insight into the role and responsibilities of appellate counsel. Regarding appellate counsel, the standards state:

> Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence.... Counsel should advise on the probable outcome of a challenge to the conviction or sentence. Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

Standard 4-8.3(b). In the absence of access to the requested transcript, appellate counsel can neither make a professional evaluation of the questions that might be presented on appeal, nor consider all issues that might affect the district court's decision to relinquish jurisdiction. Further, appellate counsel is also unable to advise Mr. Warth on the probable role the transcript may play in the appeal.

Mr. Warth is entitled to effective assistance of counsel in this appeal, and effective assistance cannot be given in the absence of access to the relevant transcript. Therefore, the Idaho Supreme Court has denied Mr. Warth his constitutional right to due process which includes a right to the effective assistance of counsel in this appeal. Accordingly, appellate counsel should be provided with access to the requested transcript and should be allowed the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review.

II.

The District Court Abused Its Discretion When It Relinquished Jurisdiction

A. Introduction

Mr. Warth was sent on "concurrent" riders in this case and in a Bingham County case which is unrelated to this appeal. In the Bingham County case, the district court

relinquished jurisdiction, and that was the basis for the district court to relinquish jurisdiction in this matter. Mr. Warth argues the district court abused its discretion when it based its decision to relinquish jurisdiction on the decision made by a different court in a different matter. Additionally, Mr. Warth's rider was excellent and he received almost no negative feedback in his Addendum to the Presentence Investigation Report (*hereinafter,* ASPI). In light of that information, the district court abused its discretion when it relinquished jurisdiction.

B. The District Court Abused Its Discretion When It Relinquished Jurisdiction

The decision to relinquish jurisdiction lies within the sound discretion of the trial court. *State v. Rhoades*, 122 Idaho 837, 837 (Ct. App. 1992). "When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is: (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason." *State v. Hedger*, 115 Idaho 598, 600 (1989). Mr. Warth does not contest whether the district court appropriately perceived its ability to relinquish jurisdiction as one of discretion. Mr. Warth argues that the district court did not exercise that discretion based on the appropriate legal standards and that the district court failed to exercise reason when relinquishing jurisdiction.

Mr. Warth was serving the functional equivalent of a concurrent rider in this matter and in the unrelated case out of Bingham County. (10/12/10 Tr., p.7, L.23 – p.8, L.3.) The district court relinquished jurisdiction in this matter because the district court in the Bingham County case relinquished jurisdiction and Mr. Warth did not participate

in the therapeutic community program recommended by the district court. (R., Vol. I., p.123; R. Vol. II., p.266.) This justification is unreasonable because the district court did not have the record of the Bingham County case before it, and it did not know the specific nuances of that case, and while a district court has broad range of discretion to relinquish jurisdiction, it cannot abdicate that decision to different court.

Additionally, the district had never had control over Mr. Warth's programming. As stated above, the district court also based its decision to relinquish on the fact that the Bingham County court's decision to relinquish jurisdiction would prevent Mr. Warth from participating in the therapeutic community program recommended by the district court. (R., Vol. I., p.123; R. Vol. II., p.266.) However, at no time did either of the district courts control Mr. Warth's programming, as that decision is controlled by the executive branch of the State government. *See generally Swain v. State*, 122 Idaho 918, 920-921 (Ct. App. 1992).

Further, the district court did not exercise reason when relinquishing jurisdiction in light of Mr. Warth's exceptional rider performance. While on his rider, Mr. Warth did not receive any formal or informal disciplinary sanctions. (APSI, p.2.) The only negative feedback provided in his APSI, is contained in the C-Notes, where Mr. Warth was warned, early in his rider, that he was "not to be talking to termers in unit 15 while waiting to be seen." (C-Note attached to APSI, p.2.) Other than that one warning, Mr. Warth's APSI contains only positive feedback regarding his rider performance.

Mr. Warth was successful in his programming. The following summarizes his performance in the new directions program:

> Mr. Warth has demonstrated the necessary skills to facilitate his successful return to his community. Mr. Warth was willing to participate in group discussions, process sessions, or homework assignments.

> Mr. Warth was able to discover his criminal and addictive thinking distortions.

(APSI, p.2.) Mr. Warth did have some "elevated risk factors," and due to those factors he was required to participate in the Release and Reintegration class. (APSI, p.3.) While in that class, staff reported as follows:

> Mr. Warth . . . openly [and] willingly . . . engaged in the group process and discussions. Mr. Warth was able to identify [that] one of his fears of being sober is his change in his lifestyle. Mr. Warth completed all of the required work and his answers were very articulate and appeared to be well-thought out. It appears that Mr. Warth has been able to acknowledge some of the relapse issues that he will face upon his return to his community. With all of this in consideration, it does appear that he is prepared to appropriately deal with these issues in the community.

(APSI, p.3 (quotation omitted).)[4] Mr. Warth also achieved level three of the Individual Accountability Model, which is the highest level that can be achieved. (APSI, p.4.)

In addition to his required programming, Mr. Warth performed over 180 hours of community service. (APSI, p.4.) Staff was so impressed with him they wrote the following:

> Mr. Warth additionally completed over 180 hours of community service while at NICI. Offenders are tasked with developing a plan to use their time in a productive and prosocial manner. Besides studying his programs, Mr. Warth was able to volunteer and work with others on the compound to stay busy and be an active participant in his own life. This is important as many offenders will perform the minimum requirements and never aspire to succeed beyond the expectation.

(APSI, p.4.) Mr. Warth also participated in the voluntary Alcoholics Anonymous and Narcotics Anonymous program. (APSI, p.4.) Staff wrote that, "Through Mr. Warth's consistent voluntary attendance to these groups, he reflects the initiative to strive toward recovery from addiction." (APSI, p.4.)

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[4] Mr. Warth completed 116 hours of his Career Planning and Portfolio course, but could not complete that course due to a scheduling conflict. (APSI, pp.3-4.)

"Mr. Warth also voluntarily participated in the Vocational Safety program to obtain his Occupational Safety and Health Administration (OSHA) General Industry standards certification while at NICI." (APSI, p.4.) Mr. Warth completed the course and was certified with OSHA's 10 hour General Industry Safety and health program. (C-Note attached to APSI, p.1.) "In addition, he passed the National Center for Construction Education and Research Final exam, certifying him with the basic safety module for his Core certification." (C-Note attached to APSI, p.1.) "He received an 83% on his final exam." (C-Note attached to APSI, p.1.) "Staff reported that Mr. Warth was an active participant in the class and performed in an excellent manner." (APSI, p.4.)

In sum, Mr. Warth's had an excellent rider. However, this performance was disregarded by the district court because a district court in an unrelated matter, relinquished jurisdiction. That fact alone does not rebut all of the good work Mr. Warth performed while on his rider. In light of the foregoing, the district court abused its discretion when it relinquished jurisdiction.

III.

The District Court Abused Its Discretion When It Failed To Reduce Mr. Warth's Sentences *Sua Sponte* Upon Relinquishing Jurisdiction

A. Introduction

Mr. Warth's age, family support, employment background, cooperation with law enforcement, and difficult childhood are mitigating factors, which support the conclusion that his sentences are unduly harsh.

B. The District Court Abused Its Discretion When It Failed To Reduce Mr. Warth's Sentences *Sua Sponte* Upon Relinquishing Jurisdiction

Mr. Warth asserts that, given any view of the facts his concurrent unified sentences of four years, with eighteen months fixed, five years, with two years fixed, and six years, with thirty months fixed, are excessive. Due to the district court's power under I.C.R. 35 to *sua sponte* reduce the length of the original sentence upon relinquishing jurisdiction, on appeal an appellant can challenge the length of the sentence as being excessive. *See State v. Schultz*, 149 Idaho 285, 288-289 (Ct. App. 2010). Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Warth does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Warth must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

As a preliminary matter, Mr. Warth incorporates the arguments made in section II(B), *supra*, herein by reference thereto.

Mr. Warth's family support is a mitigating factor. *See State v. Shideler*, 103 Idaho 593, 594 (1982). Mr. Warth was allowed to live with his mother's home and at his father's home. (03/19/07 Tr., p.6, Ls.21-24, p.24, Ls.1-4.) Mr. Warth also has support from both his paternal and maternal grandparents. (PSI, p.6.)

Additionally, Mr. Warth has a positive employment background, which is a mitigating factor. *State v. Hagedorn*, 129 Idaho 155, 161 (Ct. App. 1996). At the time of the change of plea hearing, Mr. Warth was employed at Thrifty Car Sales. (03/19/07 Tr., p.22, Ls.14-15.) According to his trial counsel:

> Shayne has shown that he is employable. During the times he was incarcerated, as soon as he would get out of his incarceration, he was able to find employment rather quickly. His employers seemed to like him. He's a good worker, so he's shown he can be a valuable member of our local society by remaining employed . . . .

(05/14/07 Tr., p.40, Ls.3-9.) Mr. Warth was working for Smith Roofing at the time of his sentencing hearing. (05/14/07 Tr., p.45, Ls.22-24.)

Additionally, Mr. Warth's age is a mitigating factor. *See State v. Cobell*, 148 Idaho 349, 356 (Ct. App. 2009). At the time of his original sentencing hearing, Mr. Warth was only eighteen years old. (05/14/07 Tr., p.29, L.25 - p.30, L.2.) Mr. Warth was only twenty two years old when the district court relinquished jurisdiction.

Further, Mr. Warth turned himself in and cooperated with law enforcement. (06/29/11 Tr., p.16, Ls.14-24.) Failure to cooperate with law enforcement can be considered as an aggravating factor. *State v. Ybarra*, 122 Idaho 11, 16 (Ct. App. 1992). Since a refusal to cooperate can be an aggravating factor, the presence of cooperation should be considered a mitigating factor. According to the State, Mr. Warth cooperated with law enforcement with "different investigations." (05/14/07 Tr., p.33, Ls.7-10.)

Finally, Mr. Warth has been exposed to a difficult childhood. In *State v. Williams*, 135 Idaho 618, 620 (Ct. App. 2001), this Court noted that an abusive childhood "is a factor that bears consideration at sentencing." Here, Mr. Warth wrote that "When I was a child my dad beat my mom and they got divorced it was hard on me I was about 6 when it happened." (Presentence Investigation Report (*hereinafter,* PSI), p.6.) However, his father his since quit his abusive behavior, remarried, and Mr. Warth loves his step mother. (PSI, p.6.)

In sum, Mr. Warth's sentences are excessively harsh when viewed in light of the mitigating factors.

CONCLUSION

Appellate counsel respectfully requests access to the requested transcript and the opportunity to provide any necessary supplemental briefing raising issues which arise as a result of that review. In the event this request is denied, Mr. Warth respectfully requests that this Court remand this matter with instructions for the district court to place Mr. Warth on probation. Alternatively, Mr. Warth respectfully requests that this Court reduce the indeterminate portions of his sentences.

DATED this 29th day of February, 2012.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of February, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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INMATE #85881
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DISTRICT COURT JUDGE
E-MAILED BRIEF

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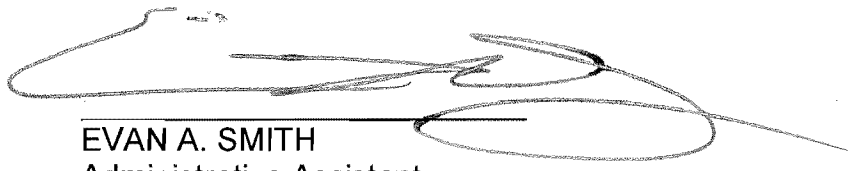

EVAN A. SMITH
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SFW/eas